IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
JUDGES COOPER, FITZGERALD AND HOEKSTRA

THE ESTATE OF LANCE NATHAN REED by and through its Personal Representative, LAWRENCE REED,

Plaintiff-Appellee,

v

THE ESTATE OF CURTIS J. BRETON, by and through its Personal Representative, FREDERICK BRETON, and HB RESORT ENTERPRISES, INC., a Michigan Corporation, a/k/a THE EAGLES NEST,

Defendants

and BEACH BAR, INC., a Michigan Corporation, a/k/a THE BEACH BAR,

Defendant-Appellant.

Supreme Court No. 127703

Court of Appeals No. 247837

Jackson County Circuit Court No. Case No. 01-4350-NI

JAMES D. KUENNER, Personal Representative of the ESTATE OF ADAM W. KUENNER,

Plaintiff-Appellee,

v

FREDERICK BRETON, Personal Representative of the ESTATE OF CURTIS J. BRETON, HB RESORT ENTERPRISES, INC., a Michigan Corporation, a/k/a THE EAGLES NEST,

Defendants

and BEACH BAR, INC., a Michigan Corporation, a/k/a THE BEACH BAR,

Defendant-Appellant.

Supreme Court No. 127704

Court of Appeals No. 247974

Jackson County Circuit Court No. Case No. 01-6423-NI

APPELLEES' BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Plaintiffs-Appellees
John D. Pirich (P23204)
Andrea L. Hansen (P47358)
222 N. Washington Square, Ste. 400
Lansing, Michigan 48933
(517) 484-8282

DENNIS HURST & ASSOCIATES
Co-Counsel for Plaintiff-Appellee Reed
Dennis Hurst (P32409)
Michael S. Rosenthal (P56633)
503 S. Jackson Street, Ste. 200
Jackson, Michigan 49203
(517) 783-3300

D'Agostini, Sable & Ruggeri, PLLC
Co-Counsel for Plaintiff-Appellee Kuenner
John M. Ketzler (P53044)
38700 Van Dyke Ave., Ste. 200
Sterling Heights, MI 48312
(586) 977-8000 x205

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

COUNTER-STATEMENT OF JURISDICTION

Appellees agree with Appellant's Statement of Jurisdiction except that this Court has jurisdiction pursuant to MCR 7.302(G)(3), rather than MCR 7.302(F)(3), as is set forth in Appellant's Brief on Appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE PLAINTIFFS-APPELLEES MUST MEET THE GENERAL BURDEN OF PROOF, AS IS SET FORTH IN MRE 301, TO REBUT THE STATUTORY PRESUMPTION SET FORTH IN MCL 436.1801(8)?

Plaintiffs-Appellees answer: Yes

Defendant-Appellant answers: No

Court of Appeals answers: Yes

II. WHETHER TESTIMONY OF LAY WITNESSES AND AFFIDAVITS OF EXPERT TOXICOLOGISTS CONCERNING BRETON'S VISIBLE INTOXICATION AFTER CONSUMING 24-25 BEERS IN A 9-HOUR PERIOD WAS SUFFICIENT EVIDENCE TO DEFEAT OR AT LEAST MEET THE REBUTTABLE PRESUMPTION SET FORTH IN MCL 436.1801(8)?

Plaintiffs-Appellees answer: Yes

Defendant-Appellant answers: No

Court of Appeals answers: Yes

I. INTRODUCTION

Although the facts underlying this case are tragic – two 17-year old boys were killed when a drunk driver crossed the centerline of the highway traveling at 100 m.p.h. and hit them head on – the issue that was before the Court of Appeals, and from which Defendant-Appellant Beach Bar, Inc. ("Beach Bar") appeals, is a simple matter of statutory construction. Specifically, whether the Dram Shop Act's[1] rebuttable presumption of nonliability for any liquor establishment who was fortunate enough to have not been the final establishment to serve a person alcohol before they harmed or killed someone, is actually a guaranty of nonliability, as the Beach Bar disingenuously suggests. The statute does not so state nor could such an absurd and inequitable result possibly have been intended by the Legislature. The Beach Bar's attempt to read into the statute language that simply does not exist was properly and flatly rejected by a unanimous panel of the Court of Appeals, which decision should be affirmed by this Honorable Court.

II. COUNTER-STATEMENT OF FACTS

At 10:11 p.m. on April 20, 2001, while traveling northbound on U.S. 127 at approximately 100 m.p.h., Curtis Breton ("Breton") crossed over the center line into oncoming traffic and collided with a vehicle occupied by Plaintiffs-Appellees' decedents, 17-year old Lance Nathan Reed ("Reed) and his best friend, 17-year old Adam W. Kuenner ("Kuenner"). **(90b – 142b)** Both vehicles caught fire on impact and none of the occupants survived. *Id.* At the time of the accident, Breton's blood alcohol level was 0.215. **(109b, 150b)**

Breton had, in fact, been drinking that entire day. He was a firefighter, who after ending a 24-hour shift at 7:30 a.m., began the day by playing hockey with some friends, including his

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[1] MCL 436.1801.

close friend and co-worker John Marsh ("Marsh"). Once the hockey game concluded, the drinking began, ending only minutes before the fatal accident.

Breton and Marsh began drinking during lunch at a local pub. **(28b – 29b)** Immediately thereafter, they purchased a twelve pack of Labatts beer from a local party store, which was consumed while assisting one of Marsh's family members repair a damaged boat dock, as April 20, 2001 was the first really warm day of the season. **(34b)** Breton and Marsh then drove to the Beach Bar, where they spent several more hours drinking alcohol and Breton repeatedly "hit on" their waitress, Lindsay Mizerik ("Mizerik"). **(36b – 39b, 82b)** Breton then drove Marsh home to arrange for a second babysitter so they could continue drinking at the Beach Bar. **(36b – 39b)** During the 10-15 minutes they waited for the babysitter to arrive, they each consumed two more beers. **(40b – 41b)**

Marsh and Breton then returned to the Beach Bar, where they drank more beer until approximately 9:00 p.m., at which time they left the crowded lakeside bar. **(42b, 47b)** They then went to the Eagles Nest Bar for one last pitcher of beer after which Breton dropped Marsh off at his home at 9:50 p.m. **(48b, 53b)** Breton then returned for a final time to the Beach Bar to once again "hit on" Ms. Mizerik. **(86b)** After again being rebuffed, Breton left the Beach Bar to drive home. It was shortly thereafter, at approximately 10:11 p.m., that he crossed the center line into the oncoming lane while traveling between 94 and 103 m.p.h. **(90b – 142b).**

At the same time, Reed was traveling as a passenger in a car driven by Kuenner. The boys were driving home from a bowling alley and traveling between 55 and 60 m.p.h. **(90b – 142b)** The boys had not been drinking or doing drugs and were in complete compliance with the law. *Id.* Their vehicle was struck head on by Breton's pick-up and both boys were killed. *Id.* At the time of the crash, Breton's blood alcohol level was .215, far in excess of the legal limit. *Id.*

Thereafter, the boys' Estates filed separate actions against the Estate of Curtis Breton in the Jackson County Circuit Court, which cases were subsequently consolidated. When in the course of discovery it was determined that Breton had been served alcohol at two licensed liquor establishments shortly before the accident, the Beach Bar and the Eagles Nest were added as Defendants.

The Beach Bar promptly filed a Motion for Summary Disposition, contending that because it was not the last establishment to serve Breton alcohol before the fatal accident it could not be found liable under the Dram Shop Act, despite the undisputed fact that the Beach Bar was responsible for serving Breton the vast majority of alcohol (determined to be 24 to 25 beers) he had consumed in the 9-hour period immediately preceding the accident, and that Breton had been drinking for many hours at the Beach Bar, leaving that bar only one hour prior to the fatal accident.

In response, Plaintiffs-Appellees contended that based on Mizerik's testimony, the last bar Breton had been at was, in fact, the Beach Bar. As such, a factual dispute existed as to which was the last bar at which he had been furnished alcoholic beverages. Regardless, even if Breton did not consume alcohol at that last stop, he was visibly intoxicated when served earlier at both bars and both bars were liable for the cause of the accident. In support of this contention, Plaintiffs-Appellees offered the testimony of several lay witnesses and two expert toxicologists.

A. <u>Deposition of John Marsh</u>

Marsh was a close friend and co-worker of Breton. **(12b)** He testified that, at 245 pounds (Breton weighed only 180), he "could tell that he had been drinking" when they left the Beach Bar at approximately 9:00 p.m. **(47b)** When asked whether he believed Breton was feeling the effects of the alcohol, Marsh stated "probably." *Id.* He further testified that when Breton dropped him off at home he specifically asked Breton if he was "okay? Everything's

going to be fine?" **(57b – 58b)** Marsh admitted he asked that question because of the alcohol Breton had consumed. **(58b)** Marsh further testified that his wife came home shortly thereafter and became very upset at his state of intoxication, ordering him to leave the house, and even locked the doors and windows to prevent his return because of his visible intoxication. **(61b – 62b)** When he left the house he drove to a nearby field rather than the road because of his intoxication. **(62b)**

Marsh also testified that Breton's fiancé had inquired of him whether Breton had been drinking more that night than normal because she was mad at him. **(68b)** Marsh further conceded that he did not ordinarily consume as much alcohol when he socialized with friends as he had on April 20, 2001 with Breton, and that could be why he did not have a clearer recollection of what happened that day. **(70b – 71b)**

B. <u>Deposition of Lindsay Mizerik</u>

Mizerik was a waitress at the Beach Bar who worked on April 20, 2001 and served Breton and Marsh. Mizerik testified that she had received training on identifying "visibly intoxicated" persons during her previous employment at Applebees, but never at the Beach Bar. **(78b)** She also testified that she had previously "cut off" visibly intoxicated persons at Applebees, but never at the Beach Bar. **(79b, 85b)** She testified that she remembered Breton because even though he was engaged to another woman, he kept "hitting on" her for a date. **(82b, 83b)** She testified that Breton returned to the Beach Bar between 10 and 11 p.m. to ask her out once again and that she did not know whether he was served alcohol at that time. **(86b – 89b)**

Not surprisingly, Mizerik testified that Breton did not appear visibly intoxicated at any time, despite the 24–25 beers he had consumed. She did concede that the bar was so busy "that you're trying to keep your head on" and that she was waiting on six tables of people. **(80b)** She

explained that waiting tables is "hard and you don't really pay attention to individual people." **(87b)** Mizerik also testified that she did not know whether any other waitress served Breton alcohol that day or evening. **(81b, 84b)**

C. Deposition of Chief Carl Hendges

Fire Chief Carl Michael Hendges testified that he went to Marsh's home that evening, shortly after the fatal crash, to advise him of the accident. **(2b)** He testified that Marsh was not there and that Marsh's wife told him they had an argument because he had drank too much that night. **(3b)** Chief Hendges asked Mrs. Marsh to call Marsh on his cell phone to come home, which she did.[2] After Mrs. Marsh handed the phone to Chief Hendges, Marsh *immediately* asked the Chief "is this about Curtis?" **(4b)** When the Chief asked him to come home, Marsh responded "Curtis is dead, isn't he?" *Id.* The Chief indicated that Marsh was visibly intoxicated when he returned home after that call, which was approximately 11:30 p.m. **(6b)**

D. Expert Toxicologists

Plaintiffs-Appellees submitted the reports of two expert toxicologists, Dr. Michael Evans and Dr. K.P. Gunaga. **(49a, 85a)** Dr. Evans concluded that based on Breton's weight, metabolism and blood alcohol level, Breton had consumed more than 22 beers in a 9-hour period and still had 12 or 13 beers in his system at the time of the accident. **(82a – 83a)** According to Dr. Evans, this concentration of alcohol would clearly have affected Breton's central nervous system, leading to visual signs of intoxication such as excitement, confusion and stupor. *Id.* Because of this high concentration of alcohol, the toxicologist determined that Breton would have been visibly intoxicated while at the Beach Bar, which would have included slurred speech, clumsiness, impairment of coordination, impaired balance, stumbling, staggering gait, drowsiness, confusion and disorientation. *Id.*

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[2] Mrs. Marsh testified that when she called Marsh, he immediately asked "Did something happen to Curtis? Is Curtis all right?"**(76b)**

Dr. Gunaga also submitted an Expert Report stating that Breton had consumed approximately 24–25 beers in a 9-hour period. **(86a)** Dr. Gunaga concluded that Breton would definitely have shown signs of visible intoxication when he was at the Beach Bar, before he left for the Eagles Nest, including slurred speech, impairment of balance and coordination, drowsiness, confusion and disorientation. *Id.*

E. Trial Court's Ruling

Despite this overwhelming evidence (of both lay and expert witnesses), the trial court granted Beach Bar's Motion for Summary Disposition, which was filed pursuant to MCR 2.116(C)(10). **(146a)** The trial court concluded that Plaintiffs-Appellees had failed to present a genuine issue of material fact regarding the last location to serve alcohol to Breton. **(148a – 149a)** Accordingly, the trial court found that the Beach Bar was entitled to a statutory presumption of nonliability pursuant to MCL 436.1801(8), as will be discussed in detail, *infra*. *Id.* The trial court further concluded that Plaintiffs-Appellees had presented sufficient circumstantial evidence to create an issue of fact regarding Breton's visible intoxication, had there been no rebuttable presumption. **(149a)** The trial court then concluded, without authority, that because it was a *statutory* presumption, in order to overcome that presumption, Plaintiffs-Appellees were required to meet a heightened burden of proof, namely "positive, unequivocal, strong and credible evidence" that Breton was visibly intoxicated when he was served at the Beach Bar. *Id.* The trial court completely ignored the lay testimony offered by Plaintiffs-Appellees and instead concluded that circumstantial evidence alone and, specifically, the affidavits of expert witnesses, was insufficient to meet this heightened burden of proof. **(149a – 150a)** The trial court then concluded that as a result there was no genuine issue of material fact and the Beach Bar was entitled to summary disposition. Plaintiffs-Appellees appealed. **(150a)**

F. Court of Appeals

The Court of Appeals reversed and remanded for a jury trial, holding that a question of fact existed regarding Breton's visible intoxication when he was served at the Beach Bar. **(151a)** The Court of Appeals agreed that because it was unclear whether Breton had been served alcohol when he visited the Beach Bar for his final time, that it was entitled to the statutory presumption. **(153a)** The issue, the Court of Appeals determined, was therefore whether circumstantial evidence of Breton's visible intoxication when served at the Beach Bar before going to the Eagles Nest was sufficient to rebut the statutory presumption. *Id.*

The Court of Appeals concluded that it was and that the heightened standard used by the trial court to rebut the presumption was used only in certain specified cases "to give weight to probability and social policy," not, as concluded by the trial court, to rebut every statutory presumption. **(155a)** In this instance, those reasons do not apply and the statute at issue does not identify or delineate a higher burden of production to rebut the presumption than the general standard set forth in MRE 301. *Id.* The Court of Appeals recognized that it was not entitled to "presume that an omission in a statute was unintentional and fill in the blanks." **(156a)** The Court of Appeals correctly noted that had the Legislature intended to impose a higher burden it would have done so and it was not for the judiciary to rewrite the statute. *Id.* The Court of Appeals thus concluded as follows:

> [T]he standard to rebut the presumption is the presentation of competent and credible evidence that it was more probable than not that Mr. Breton was visibly intoxicated when he was served at defendant's bar. Plaintiffs presented circumstantial evidence in this regard. Mr. Marsh testified that he felt the effects of the alcohol he consumed when the men left defendant's bar and he assumed Mr. Breton felt the same. The expert toxicologists' reports indicated that Mr. Breton had a significant amount of alcohol in his system when served at defendant's bar. Based on that amount, the experts believed that Mr. Breton would have exhibited visible signs of intoxication at that time.

> Circumstantial evidence in support of or against a proposition is equally competent with direct. As plaintiffs presented competent and credible evidence that Mr. Breton was visibly intoxicated when he was served at defendant's bar, the trial court improperly found that plaintiffs failed to overcome the statutory presumption of non-liability. Plaintiffs presented sufficient evidence to create a genuine issue of material fact to place this issue before the trier of fact and defendant's motion for summary disposition was improperly granted.

Id. (citations omitted).

It is from this decision that the Beach Bar sought and was granted leave to appeal to this Court. Because the decision of the Court of Appeals was unquestionably correct and in accord with well-settled rules of statutory construction, the decision of the Court of Appeals should be affirmed.

III. ARGUMENT

A. COUNTER-STATEMENT OF STANDARD OF REVIEW

The Beach Bar appeals the Court of Appeals' decision reversing the trial court's granting of summary disposition pursuant to MCR 2.116(C)(10). Review of the trial court's determination regarding a motion for summary disposition is *de novo*. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the trial court considers the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. MCR 2.116(G); *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628

NW2d 33 (2001). The trial court may not make findings of fact or weigh credibility at the summary disposition stage. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE REBUTTABLE PRESUMPTION SET FORTH IN THE DRAM SHOP ACT IS MET BY THE GENERALLY ACCEPTED BURDEN OF PROOF SET FORTH IN MRE 301.

1. Introduction

It is not contested that during the afternoon and evening hours of April 20, 2001, the Beach Bar provided alcohol to Breton, who consumed said alcohol on its premises, said consumption being a proximate cause of Breton's intoxication and the ensuing accident that killed two 17-year old boys. What is in dispute is the Beach Bar's claim that because it was not the last liquor establishment to serve Breton before this fatal crash, it is absolved from any liability for this incident under the Dram Shop Act. This contention is simply untrue and directly contrary to the legislative purpose and intent of the Dram Shop Act and public policy.

There is no question that the Beach Bar owed a duty to Reed and Kuenner and others to use due care and caution when serving alcohol at its establishment. MCL 436.1801(3). The Beach Bar, however, contends that because it was not the last establishment to serve alcohol to Breton it cannot be held liable despite its unquestionable negligence. MCL 436.1801(3) provides as follows:

> Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00

> in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.

And the statutory provision here at issue, MCL 436.1801(8), provides:

> There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

Subsection (8), as set forth above, was an amendment to the Dram Shop Act that went into effect in 1986. It is clearly designed to protect liquor establishments from a situation in which a plaintiff's attorney sues every place that a person drank or purchased alcohol the entire day of the accident, regardless of whether there is any evidence to suggest that bar or other establishment was in any way at fault for the incident.[3] This is obviously not the situation here, where there is ample evidence demonstrating that Breton drank alcohol for many hours at the Beach Bar, drank the majority of the alcohol he consumed that day at the Beach Bar, and left that bar only one hour prior to the fatal accident.

Because the term "rebuttable presumption" is not defined in the Dram Shop Act, the general rule, as set forth in MRE 301[4], applies. The Beach Bar, however, erroneously and

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[3] Amendments to the Dram Shop Act were introduced in 1985 at the urgings of the Michigan Licensed Beverage Dealers Association and insurance companies that were concerned that plaintiffs' attorneys were using a "shot gun style" approach to determine liability in cases involving drunk drivers. The proponents maintained that some plaintiff attorneys' litigation strategy would be to name all the bars at which the intoxicated person had consumed liquor on the date of the accident, even bars visited much earlier in the day, which often had a tenuous, at best, connection to the accident. As a result, § 8 was enacted to establish a rebuttable presumption in favor of those who were not the last establishment to serve alcohol. As stated in the legislative analysis "This provision is aimed at the practice of indiscriminately suing all of the establishments a person has visited on the day of an accident. The bill would allow a bar other than the last visited to be brought into a case only if there was a showing that there was some reason to." **(152b – 163b)**

[4] MRE 301 provides: "In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to

without foundation asserts that this rebuttable presumption can only be defeated by a heightened burden of proof. The primary issue before the Court of Appeals was what must a plaintiff proffer to rebut this statutory presumption. That Court correctly held that it would not read into the legislation that which was not there, and the general rule of MRE 301 applied.

2. As a General Rule, a Rebuttable Presumption is Defeated by Competent and Credible Evidence.

A rebuttable presumption is "[a] presumption that can be overturned upon the showing of sufficient proof." Black's Law Dictionary (6th ed). According to Black's Law Dictionary, all presumptions other than conclusive presumptions are rebuttable. *Id.* Pursuant to the Michigan Rules of Evidence, a presumption in a civil case, "imposes on the party against whom it is directed the burden of going forward with evidence to *rebut or meet* the presumption without shifting the ultimate burden of persuasion in the case." [Emphasis added.] According to McCormick, this is the most widely accepted view of rebuttable presumptions. The presumption shifts the burden of producing evidence with respect to the presumed fact. Once the challenging party produces contrary evidence, the presumption disappears. McCormick on Evidence §344, pg 445 (5th ed); **(154a, n12)**.

MRE 301 applies to *both* statutory and common law presumptions. *Koopman v Logan*, 93 Mich App 252, 255; 286 NW2d 872 (1979) ("[I]n the absence of any language in the statute indicating that this presumption is to be dealt with in a special way, this Court agrees with the plaintiff that MRE 301, which covers the presumption in civil cases, applies[.]"). *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985), issued shortly after the adoption of MRE 301, clarified Michigan law regarding presumptions in the civil context, holding that the sole function of a civil presumption is to place the burden of producing evidence on the opposing party. *Id.* at

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such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

289. *See also Bieszck v Avis Rent-A-Car System, Inc,* 459 Mich 9, 19 n 9; 583 NW2d 691 (1998). A presumption dissipates when the burden of production is met. *Isabella Co Dep't of Social Services v Thompson*, 210 Mich App 612, 615; 534 NW2d 132 (1995); *State Farm Mut Auto Ins Co v Allen*, 191 Mich App 18, 22; 477 NW2d 445 (1991). This Court explained this concept in *Widmayer* as follows:

> [I]f the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.
>
> We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.
>
> Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence.

422 Mich at 289. "To make rebuttable presumptions 'disappear' the challenging party must generally produce credible or competent evidence to the contrary." **(156a)** (citing *Krisher v Duff*, 331 Mich 699; 50 NW2d 332 (1951)), in which this Court held:

> It has been well settled in this State that the effect of a rebuttable presumption is to make out a prima facie case at the beginning of trial. Having established the original prima facie case, the presumption then casts the burden of proof on the opposite party. Presumptions cannot be weighed against other credible evidence, for they have no value as evidence unless no other credible evidence whatsoever is introduced in regard to the presumed fact. **As a rule, they disappear if and when credible evidence is introduced from which the facts may be found.**

Id. at 705 (emphasis added); *see also State Farm, supra* at 22 (opposing party's presentation of evidence rebutting the presumption dissipates the presumption).

There are numerous examples of statutory presumptions which may be rebutted by competent and credible evidence to the contrary, as is the general rule as set forth by MRE 301. *See, e.g.,* MCL 257.675a (registrant of illegally parked vehicle is presumed responsible; rebutted by "competent evidence" of another's liability); MCL 560.255b (presumption that offer of land dedicated for public use under Subdivision Act may be rebutted by "competent evidence" that dedication was withdrawn); MCL 213.51 (condemning authority's resolution of necessity creates presumption of necessity; can be defeated by "evidence to the contrary"); MCL 600.5042 (statutory presumption of validity of agreement to arbitrate medical malpractice claims can be rebutted by "contrary evidence"); MCL 324.14809 (presumption that disclosure is voluntary rebutted by "adequate showing"); MCL 440.1211 (a reference to ECU is presumed to be a reference as a unit of account of European community, which presumption is rebutted by showing "contrary" intent of the parties); MCL 400.608 (rebuttable presumptions concerning knowingly making claims for medicaid benefits); and MCL 570.1107 (improvement to real property pursuant to a contract which was entered into by an owner or lessee shall be presumed to have been consented to by any other co-owner or co-lessee, but the presumption should in all cases be rebuttable).

Likewise, the Dram Shop Act sets forth a standard rebuttable presumption which may, as is the norm, be rebutted by competent and credible evidence to the contrary. Although the Dram Shop Act is remedial in nature, the courts cannot read into the statute that which is not there. *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 616 n 9; 321 NW2d 668 (1982). The Dram Shop Act provides the exclusive remedy against licensed liquor establishments for selling liquor to intoxicated persons who then cause injury or death to another. MCL 436.1801(3). MCL 436.1801(8) makes it more difficult to pursue recovery against an establishment which is not the last establishment to serve alcohol to the intoxicated person, but not impossible, as the Beach Bar

erroneously asserts. Rather, it creates a "rebuttable presumption" that the establishment is not liable under § 3. That term is not defined and, thus, the general rule under MRE 301 and common law clearly applies, which means a plaintiff must come forward with competent and credible evidence to defeat or at least meet the presumption. There is no indication that the Legislature intended to impose a heightened or unique standard for rebuttal. Under basic and well-settled principles of statutory construction, the general rule must therefore apply.

3. Applicable Rules of Statutory Construction

The wisdom of a statute is for the Legislature to decide and the law must be applied as written. *Ramsey v Kohl,* 231 Mich App 556, 563; 591 NW2d 221 (1998). A court's function in interpreting statutes is not to redetermine the Legislature's choice or to independently assess what is most fair or just or best public policy, but to discern the intent of the Legislature from the language of the statute it enacts. *Hanson v Mecosta Cty Rd Comm'rs,* 465 Mich 492, 504; 638 NW2d 396 (2002). The Legislature is presumed to have intended the meaning it plainly expressed, and nothing should be read into a statute that is not written. *People v Al-Saiegh*, 244 Mich App 391, 399; 625 NW2d 419 (2001). The manifest intention of the Legislature is gathered from the provisions of the act itself. *Id.* Where language of a statute is clear, judicial interpretation is unnecessary; the Legislature is presumed to have intended the meaning plainly expressed in the statute and the language must be enforced as written. *People v Evans*, 213 Mich App 671, 674-75; 540 NW2d 489 (1995).

Language of a statute must be read according to its ordinary and generally accepted meaning. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 173; 610 NW2d 613 (2000). Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning; technical terms are to be accorded their peculiar meanings. *Theisen v Knake,* 236 Mich App 249, 253; 599 NW2d 777 (1999); *see also*

Vitale v Auto Club Ins Ass'n, 233 Mich App 539, 542; 593 NW2d 187 (1999) (meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense). Statutes must be construed according to the ordinary and approved usage of the language. *Dep't of Treasury v Psychological Resources, Inc,* 147 Mich App 140, 145; 383 NW2d 144 (1985).

The Legislature is presumed to be aware of the consequences of the use or omission of language when it enacts the laws that govern our behavior. *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004). The courts may not read into a law a requirement that the Legislature has seen fit to omit. *In re Hurd-Marvin Drain,* 331 Mich 504, 509; 50 NW2d 143 (1951); *see also Alexander v MESC,* 4 Mich App 378, 383; 144 NW2d 850 (1966). Courts cannot assume that the Legislature inadvertently omitted from one statute language that it placed in another statute and then, based on that assumption, apply what is not there. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993). Omissions in statutes are deemed to be intentional. *Johnson v Marks*, 224 Mich App 356, 358; 568 NW2d 689 (1997). When the Legislature adopts a word or phrase having a settled, definite and well-known meaning at common law, the courts must assume that word or phrase is used with that common law meaning, unless a contrary intent is apparent. *In re Childress Trust*, 194 Mich App 319, 326; 486 NW2d 141 (1992).

Had the Legislature intended to impose a heightened burden of proof on a plaintiff in a dram shop case, it would have expressly set forth that standard within the statute itself. The Legislature is certainly presumed to be aware that the general standard to rebut a statutory presumption is as set forth in MRE 301 and not, as the Beach Bar suggests, the heightened burden, which is used in only very limited contexts. Indeed, the Legislature is perfectly capable of setting forth a specific standard to rebut a presumption when that is its intent. *See, e.g.,* MCL

570.1203 (presumption regarding payment of contractor for improvement may be overcome "only by a showing of clear and convincing evidence to the contrary"); MCL 257.303(4)(b) (presumption regarding habitual offenders may only be rebutted by "clear and convincing evidence"); MCL 490.58 (presumption regarding intents of parties to multiple party accounts are rebuttable by "clear and convincing" evidence of different intentions).

4. Exception to General Rule

The Beach Bar contends that a departure from the general rule should apply, contrary to these well-settled rules of statutory construction. Specifically, it argues that a "heightened" standard should be used, despite the fact that the statute does not indicate as such and that such a high burden would seriously erode the public policy underlying the Dram Shop Act. Indeed, although the Beach Bar suggests that *all* statutory presumptions are subjected to this heightened burden, it was only able to cite to two such examples. The Beach Bar's theory is just wrong as a matter of fact and law.

The Beach Bar cites specifically to the owner liability statute as support for its flawed premise that all statutory presumptions are subject to a heightened standard. The owner liability statute creates a rebuttable presumption that a driver who is an immediate family member of a vehicle owner is presumed to be driving with the vehicle owner's permission. MCL 257.401(1). Michigan courts have held that to overcome this statutory and common law presumption, the challenging party must provide "positive, unequivocal, strong and credible evidence" that the car was not driven with the owner's knowledge or consent. This Court has indicated that a heightened burden is necessary *in this instance* for many reasons. First, "an automobile, if driven by an inexperienced, incompetent or reckless driver, partakes of the nature of a dangerous instrumentality." *Krisher, supra* at 707. Second, the only witnesses who can testify to the owner's knowledge or consent are the owner and his or her relatives or acquaintances and such

witnesses are unlikely to testify in the opposing party's favor. *Id.* at 706. Such departures from the general rule that a rebuttable presumption can be defeated by producing contrary evidence occur rarely, however, and only to give weight to "probability and social policy." *Widmayer, supra.* Indeed, in this instance, the policy reasons that support a heightened standard in the owner liability statute are the very same reasons that would support a lesser burden in a dram shop action.

The second example cited by the Beach Bar is equally as unpersuasive. The Beach Bar cites to what is commonly known as the "rear-end" statute, MCL 257.402, where a rebuttable presumption of negligence can be inferred in cases where one vehicle rear-ends another. Although the courts do apply a heightened "clear and convincing" standard, it is only to the question of whether the presumption of negligence has been rebutted as a matter of law, it does not control the issue of whether the facts in a particular case should be submitted for jury determination. *Baumann v Potts*, 82 Mich App 225, 231-32; 266 NW2d 766 (1978). Thus, if the presumption is defeated, the *opposing party* is actually entitled to a directed verdict. *Id.* But if the evidence is insufficient to defeat the presumption per the heightened standard, the issue goes to the jury for a final determination. *Id.*

There are no such public policy reasons to justify Beach Bar's plea for a heightened burden in the dram shop context. Indeed, such a heightened standard would be contrary to public policy in this instance. If plaintiffs were required to demonstrate by "positive, unequivocal, strong and credible evidence" that the person was visibly intoxicated before they could even get to a jury, no liquor establishment other than the last establishment could ever be found liable, because the only persons that could testify as to whether the person was served while visibly intoxicated are the person himself, his friends, and the person serving the alcohol, all of whom are highly motivated to testify otherwise. Indeed, what the Beach Bar suggests arguably

imposes a subjective standard with respect to visible intoxication that has been soundly and consistently rejected by the Michigan courts. In *Miller v Ochampaugh*, 191 Mich App 48; 477 NW2d 105 (1991), for example, the Michigan Court of Appeals recognized that the "adoption of a subjective standard would essentially do away with the dram shop cause of action," and it would be "virtually impossible" for a plaintiff to establish his cause of action. *Id.* at 59. It would make no sense, the Court concluded, to impose a duty on a dram shop to then allow the dram shop "to escape responsibility by willfully avoiding the determination whether a patron is visibly intoxicated." *Id.*; *see also Crider v Borg*, 109 Mich App 771, 774; 312 NW2d 156 (1981) (cooperation of the tavern's agents cannot be expected, nor from patrons of bar and friends of allegedly intoxicated persons).

Most significantly, however, is that there is no indication whatsoever that the Legislature intended a standard other than that set by the general rule to apply to the rebuttable presumption set forth in MCL 436.1801(8). The particular objective of the Legislature in enacting the Dram Shop Act was to discourage bars from selling intoxicating beverages to minors or visibly intoxicated persons and to provide for recovery under certain circumstances by those injured as a result of the illegal sale of intoxicating liquor. *Browder, supra.* There is no indication the Legislature intended to create what in essence would be an irrebuttable or conclusive presumption in favor of those same liquor establishments, and such a burden should not be imposed by the judiciary. *Poplawski v Huron Clinton Metropolitan Authority*, 78 Mich App 644, 652; 260 NW2d 890 (1977) (irrebuttable presumptions are disfavored as foreclosing an issue from the trier of fact).

Finally, the Beach Bar's contention that "common sense" dictates the imposition of a heightened standard where, as here, the presumption favors a defendant, is not convincing. A presumption is intended to decrease the burden on the party who benefits from the presumption,

not increase the burden on the opposing party. Here, Beach Bar unquestionably benefited as a result of the presumption of nonliability. It had the ability to move for summary disposition pursuant to MCR 2.116(C)(10) without having to produce any affidavits or other documentary evidence, as would normally be the case. Rather, it could simply rely on the statutory presumption to argue nonliability. Plaintiffs-Appellees were then forced to come forward with evidence to defeat that motion as if the Beach Bar had actual evidence of nonliability. Obviously, Beach Bar obtained a benefit as a result of this statutory provision and the presumption is a meaningful and effective procedural device, despite the fact that it favors defendants. That fact alone does not, under common sense or otherwise, dictate a heightened burden of production for a plaintiff. Rather, in keeping with the intent of the Legislature, plaintiff must simply be able to show there is some "reason" for suing this particular defendant, before it may proceed with its case to the jury.

5. Even assuming arguendo that the heightened burden applies, Plaintiffs-Appellees still should be able to take the case to a jury.

Moreover, in a misguided attempt to support its novel theory, the Beach Bar has completely misconstrued the law and, significantly, the effect, of a rebuttable presumption. The Beach Bar, without any citation or other legal support suggests that because the statutory presumption at issue favors a defendant, the Legislature must have intended to require the plaintiff to not only prove its case as to that defendant in order to defeat the presumption, but to do so without the opportunity to present its evidence to a jury. No where does the Legislature suggest that by enacting this rebuttable presumption it intended to impose such an onerous threshold burden on a plaintiff. Furthermore, under well-settled Michigan precedent, rebuttable presumptions are not utilized in the manner suggested here by the Beach Bar, regardless of the standard required to offset the particular presumption at issue. The Beach Bar has completely misstated the legal effect of a rebuttable presumption.

First, a rebuttable presumption relieves the party for whom it favors from coming forward with evidence not, as suggested by the Beach Bar, increases the burden of production on the party opposing the presumption. Second, the party for whom the presumption applies is not automatically entitled to prevail unless the opposing party fails to come forward with *any* evidence to rebut the presumption. Indeed, if the opposing party is able to defeat the presumption altogether, it is that party that is entitled to prevail on the issue and may be entitled to a directed verdict. And as long as some evidence is proferred, even if insufficient to defeat the presumption altogether, the ultimate issue must be decided by the jury, not the judge.

The applicability of a legal presumption is a question of law for the trial court to determine. *Widmayer*, *supra* at 280. Once a trial court determines that a presumption applies in a particular case, that presumption acts as a "procedural device which regulates the burden of going forward with the evidence." *Id.* at 286. MRE 301 clearly provides that a presumption never shifts the burden of proof, but merely requires the opposing party to come forward with evidence to rebut the presumption. Therefore, if a statutory presumption is found to apply and if that presumption is completely unrebutted, then the party to whom the presumption favors is entitled to a directed verdict. If evidence is offered sufficient to rebut the presumption, then the presumption effectively disappears, like the proverbial "bursting bubble." *Widmayer*, *supra* at 286-87. If, however, the opposing party offers evidence to rebut the presumption, and the evidence is less than the standard required to defeat the presumption entirely, the question whether the presumption has been overcome should be settled by the jury. *Baumann, supra* at 230 (citing *Petrosky v Dziurman*, 367 Mich 539; 116 NW2d 748 (1962)); *see also Garrigan v La Salle Coca-Cola Bottling Co*, 362 Mich 262, 264; 106 NW2d 807 (1961) (without sufficient evidence to defeat presumption, question whether such presumption has been overcome should be settled in the jury room); *Szymborski v Slatina*, 386 Mich 339, 340-41; 192 NW2d 213 (1971)

(standard of "clear, positive, unequivocol and strong" only applies to determine whether presumption was defeated as a matter of law, not as a matter of fact, which must be determined by a jury); *Valente v Wech*[5], unpublished *per curiam* opinion of the Court of Appeals, decided March 31, 1998 (Docket No. 193409) (same); *Palacio v Aikens*[6], unpublished *per curiam* opinion of the Court of Appeals, decided May 7, 2002 (Docket No. 228165) (although defendant could not meet heightened standard to rebut presumption of consent in owner liability statute, she did submit sufficient evidence to create material fact).

Accordingly, even if the heightened standard urged by the Beach Bar applies, Plaintiffs-Appellees are still entitled to take their case before a jury. Even assuming that, as the trial court held, Plaintiffs-Appellees could not meet the heightened standard such that they were entitled to defeat the presumption and obtain a directed verdict of liability, Plaintiffs-Appellees clearly created a sufficient issue of fact to warrant review and determination by a jury.

C. THE LAY AND EXPERT TESTIMONY PROFFERED BY PLAINTIFFS-APPELLEES WAS SUFFICIENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO BRETON'S VISIBLE INTOXICATION.

1. Circumstantial evidence is sufficient to establish visible intoxication.

There is a no liability under the Dram Shop Act unless a plaintiff is able to demonstrate that the dram shop sold, gave or furnished alcohol to a "visibly intoxicated" person. MCL 436.1801(3). The statute creates a rebuttable presumption that only the last bar to serve the visibly intoxicated person is liable. In order to rebut that presumption, the plaintiff must offer some evidence that a dram shop, other than the last dram shop, served the person alcohol while visibly intoxicated, which caused or contributed to the resulting injury.

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[5] Attached hereto as Exhibit 1.

[6] Attached hereto as Exhibit 2.

The term "visibly intoxicated" is not defined by the Dram Shop Act. The original Dram Shop Act simply provided that it was unlawful to provide alcohol to an "intoxicated" person. MCL 436.22. The adjective "visibly" was added in 1972 after considerable debate, but little explanation or guidance is provided in the legislative history or statute itself as to what would actually constitute visible intoxication. 1972 PA 196.

SJI2d 75.02 defines "visibly intoxicated" as follows:

> A person is visibly intoxicated when his or her intoxication would be apparent to an ordinary observer.

See also Miller, supra. Contrary to the Beach Bar's bald assertions to the contrary, Michigan courts have consistently held that an action under the Dram Shop Act may be proven by circumstantial evidence and that, if the combination of the circumstantial evidence and the permissible inferences drawn therefrom are sufficient to establish a prima facie case, a directed verdict is improper. *Heyler v Dixon*, 160 Mich App 130, 145-46; 408 NW2d 121 (1987) (citing *Villa v Golich*, 42 Mich App 86, 88; 201 NW2d 349 (1972), *Durbin v K-K-M Corp*, 54 Mich App 38, 56-57; 220 NW2d 110 (1974), and *Lasky v Baker*, 126 Mich App 524, 529; 337 NW2d 561 (1983)).

Likewise, in *Dines v Henning*, 437 Mich 920; 466 NW2d 284 (1991), this Court reversed the Court of Appeals and adopted the dissent in *Dines v Henning*, 184 Mich App 534; 459 NW2d 305 (1990), which stated:

> Eyewitness testimony of visible intoxication is not required to establish a dram shop claim; visible intoxication may be proven by circumstantial evidence and the inferences drawn therefrom.

184 Mich App at 540-41.

The Court of Appeals again confirmed that circumstantial evidence alone may be used to demonstrate visible intoxication in *Miller, supra* at 58. That Court also held that the standard to determine visible intoxication was objective, rather than subjective. *Id.* at 59. Indeed, the Court

concluded that "adoption of a subjective standard would essentially do away with the dram shop cause of action" because of the ease of a dram shop avoiding liability under such circumstances. *Id.* at 58-60.

Michigan courts have also recognized that there are many situations in which a person may be "visibly intoxicated" as set forth in the Dram Shop Act, but not exhibit physical signs of intoxication, such as staggering or weaving. In *Arciero v Wicks*, 150 Mich App 522; 389 NW2d 116 (1986), for example, the Court of Appeals noted that if the allegedly intoxicated person admitted he was drunk, that would constitute visible intoxication for purposes of the Dram Shop Act. *Id.* at 530, n 3. The Court stated further that visible intoxication is not limited strictly to "visually" observed intoxication and that, for example, slurred speech has been considered an indicator of visible intoxication. *Id.* (citing *McKnight v Carter*, 144 Mich App 623, 630; 376 NW2d 170 (1985), discussing *Lasky v Baker*, 126 Mich App 524; 337 NW2d 561 (1983)). Thus, any external manifestation of intoxication can render a person 'visibly' intoxicated. *Id.*

The Beach Bar further contends, without support or citation, that not only is circumstantial evidence insufficient to establish visible intoxication (which is directly contrary to decades of settled Michigan precedent) but that expert testimony is insufficient to establish visible intoxication. The trial court, also without support or citation, held that although expert testimony would be sufficient to meet the Plaintiffs-Appellees' prima facie case, it was insufficient to rebut the statutory presumption of nonliability given the heightened standard that the trial court erroneously concluded applied. Michigan law clearly recognizes that expert opinions on visible intoxication are highly relevant circumstantial evidence. In this case, there is

both expert and lay testimony to support a conclusion of visible intoxication, but the expert testimony alone should have been sufficient to get the case before a jury.[7]

As recognized by this Court in *Downie v Kent Products, Inc*, 420 Mich 197; 362 NW2d 605 (1985), *as amended,* 421 Mich 1202; 367 NW2d 831 (1985):

> The function of the expert witness is to supply expert testimony. This includes, when proper foundation is laid, opinion evidence. This opinion evidence may even embrace ultimate issues of fact.

Id. at 204. In dram shop litigation, the courts have repeatedly recognized the difficulties plaintiffs face in proving their case because very often all of the parties with direct knowledge are highly motivated to deny that the allegedly intoxicated person was visibly intoxicated. In this particular circumstance, the allegedly intoxicated person is dead and Marsh, his only companion at the Beach Bar, was admittedly drunk himself.

It is settled precedent, however, that blood alcohol content is relevant to whether a person is visibly intoxicated and that an expert opinion in that regard is highly relevant circumstantial evidence. At least one panel of the Court of Appeals has concluded that the "physiological effects of the blood alcohol content upon defendant must be proven by the testimony of a properly qualified expert[.]" *People v Hempstead*, 144 Mich App 348, 353; 375 NW2d 445 (1985). Indeed, in *Chiesa v Delta MP, Inc*[8], unpublished *per curiam* opinion of the Court of Appeals, decided October 7, 1997 (Docket No. 190034), the Court of Appeals held that the plaintiff had failed to defeat the rebuttable presumption in the Dram Shop Act because "no

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[7] Other jurisdictions are in accord. *See, e.g.,* Exhibit 3, *Knapp v Holiday Inns, Inc*, 682 SW2d 936 (1984) (evidence concerning blood alcohol concentration and properly admitted expert testimony concerning the conclusions that can be drawn from the results of the blood alcohol concentration test are relevant to the question of visible intoxication and sufficient to create a material factual dispute); Exhibit 4, *Booker, Inc v Morrill*, 639 NE2d 358 (1994) (expert testimony of visible intoxication held sufficient to defeat the bartenders' and other witnesses' contrary testimony).

[8] Attached hereto as Exhibit 5.

expert testimony has been proferred to indicate that six beers would produce any level of intoxication. . . that would become visible . . ." *See also Dines, supra* at 541 (expert affidavit stated that there was a probability in excess of 90% that an adult with a blood alcohol content of .24% would manifest visible signs of intoxication).

Given the extreme difficulty in proving visible intoxication in dram shop cases, the recognized importance of expert testimony as to the physiological effect of alcohol on a particular individual and the settled precedent that circumstantial evidence is sufficient to demonstrate visible intoxication, expert testimony alone should unquestionably be deemed sufficient to create an issue of fact and allow a case before a jury. The jury can then decide, as the trier of fact, whether the absence of direct testimony is fatal to any particular plaintiff's claim. Regardless, in this case, there was evidence proferred from both expert and lay witnesses, as well as documentary evidence including a detailed police report, to support or at least create an issue of fact concerning Breton's visible intoxication.

2. Plaintiffs-Appellees clearly produced sufficient evidence to rebut or at least meet the presumption for purposes of a motion filed pursuant to MCR 2.116(C)(10).

Plaintiffs-Appellees proffered competent and credible evidence sufficient to defeat the Beach Bar's Motion filed pursuant to MCR 2.116(C)(10). As recognized by the Court of Appeals, Plaintiffs-Appellees produced both lay and expert testimony, plus documentary evidence, to support the fact that Breton was visibly intoxicated while served at the Beach Bar, which intoxication led to the deaths of Reed and Kuenner. The trial court also recognized that the Plaintiffs-Appellees had proffered sufficient evidence to both make their prima facie case and to defeat the presumption if the general rule set forth in MRE 301 applied. Accordingly, at a minimum, the trial court should have allowed the issue to go before a jury, even if it determined

the presumption had not been fully dissipated by the Plaintiffs-Appellees' evidence of visible intoxication. *Baumann, supra, Garrigan, supra.*

In this instance, there exists both lay and expert witness testimony to support a finding of visible intoxication as well as a statutory presumption. Marsh, who Breton had been drinking with all day, was so intoxicated that his wife kicked him out of the house in anger at his obvious state of visible intoxication. The Fire Chief, who saw Marsh an hour after the accident, also observed his visible intoxication. Marsh himself admitted that he was drunk and that Breton had probably felt the effects of the alcohol. Marsh and Breton had been drinking at the Beach Bar for several uninterrupted hours, leaving that bar only 1 hour prior to the fatal accident. Marsh, weighing 245 pounds, even asked Breton right before he left if he was okay to drive. The waitress testified that Breton had repeatedly hit on her, even minutes before the accident, and despite the fact that he was engaged to another woman. When the Chief contacted Marsh shortly after the accident, the first thing he said was "Is Curtis okay?" He then inquired whether Curtis was dead. As a result of this accident, Marsh no longer drinks alcohol.[9] To the extent the Beach Bar discounts or offers contrary testimony, there exists a clear factual dispute as to whether Breton was visibly intoxicated, which dispute rests on issues of credibility that may only be assessed by a jury.[10] *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 365; 480 NW2d 275 (1991) (trial court should not usurp a jury's right to determine credibility when deciding a motion for summary disposition).

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[9]The Beach Bar disingenuinely asserts that the only evidence that Plaintiffs-Appellees proffered regarding visible intoxication was their two expert toxicologists, which is simply untrue. Plaintiffs-Appellees offered the testimony of numerous lay witnesses, including Marsh, Marsh's wife, Mizerik and the Chief, all providing evidence of Breton's visible intoxication.

[10] In *McKenzie v Estate of Taft*, 434 Mich 858; 450 NW2d 266 (1990), this Court held that the jury would have been justified in disbelieving the testimony of 6 persons, including club employees and friends, who claimed that the person at issue was not visibly intoxicated, given that he had consumed 10 beers while playing 18 holes of golf, drank 2 mixed drinks on the "19th hole" and had drank at lunch before the golf game even began.

The expert toxicologists concluded that Breton had drank 24–25 beers in 9 hours, the vast majority of which were drank at the Beach Bar. Furthermore, they concluded that he would have exhibited numerous visible signs of intoxication at the time that he was at the Beach Bar. He was obviously driving recklessly given that he was traveling at 100 m.p.h. when he crossed the centerline of the highway.

Moreover, Breton's blood alcohol level was .215. Under the law in effect at the time of the incident in question, legal intoxication was 0.10 grams or more of alcohol in each 210 liters of breath or 100 milliliters of blood. MCL 257.625a(7). There is no dispute that Breton's blood alcohol level was .215, or more than twice the legal limit. Therefore, Breton presumptively had an "impaired ability to function due to the influence of intoxicating liquor" under MCL 600.2955(2)(b); *see also* MCL 257.625a(9), as in effect at time of incident, stating that blood alcohol levels in excess of .10 will result in "presumptions" that a defendant's ability to operate a vehicle was impaired," or that a "defendant was under the influence of intoxicating liquor." *See also Mallison v Scribner*, ____ NW2d ____, n 4, 2005 WL 1923150 (2005) (blood alcohol content of .229 raises a presumption that defendant was under influence of intoxicating liquor at time of accident); *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 463; 702 NW2d 671 (2005) (given that decedent's blood alcohol content was .32, it is undisputed that he had "an impaired ability to function due to the influence of intoxicating liquor").

Plaintiffs-Appellees clearly presented sufficient evidence to rebut the presumption and defeat the Beach Bar's Motion for Summary Disposition filed pursuant to MCR 2.116(C)(10). Factual and credibility issues clearly exist and, at a minimum, this issue should have been allowed to go before a jury for determination.

IV. CONCLUSION AND REQUEST FOR RELIEF

The November 18, 2004 decision of the Michigan Court of Appeals is correct and in accord with well-settled principles of statutory construction and Michigan precedent. Accordingly, Plaintiffs-Appellees respectfully request and submit that the Court of Appeals' decision should be affirmed by this Honorable Court.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Plaintiffs-Appellees

By: _____
John D. Pirich (P23204)
Andrea L. Hansen (P47358)
222 North Washington Square
Suite 400
Lansing, MI 48933-1800
(517) 377-0709

DENNIS HURST & ASSOCIATES
Co-Counsel for Plaintiff-Appellee Reed
Dennis Hurst (P32409)
Michael S. Rosenthal (P56633)
503 S. Jackson Street, Ste. 200
Jackson, MI 49203
(517) 783-3300

D'Agostini, Sable & Ruggeri, PLLC
Co-Counsel for Plaintiff-Appellee Kuenner
John M. Ketzler (P53044)
38700 Van Dyke Ave., Ste. 200
Sterling Heights, MI 48312
(586) 977-8000 x205

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